IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 11TH JANUARY 2007 / 21ST PAUSHA 1928

S.A.No. 407 of 1993(F)

(A.S.50/1991 OF THE SUB COURT, VADAKARA)
(O.S.207/88 OF THE MUNSIFF'S COURT, VADAGARA)

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APPELLANT/APPELLANT/PLAINTIFF:

EDAYATH MOIDU, S/O. AMMAD, TRADER,
RESIDING AT VYKKILASSERI AMSOM,
KURIKKILAD DESOM, KOZHIKODE DISTRICT.

BY ADV. SRI.O.RAMACHANDRAN NAMBIAR
SMT.SHEEJA DIVAKARAN.

RESPONDENT/RESPONDENT/DEFENDANT:

PUTHANPURAYIL MEETHALE AMSOM PARAMBIL KUNHAVULLA,
S/O. AMMAD, TRADER, VYKKILASSERI AMSOM,
KURUKKILAD DESOM, VADAKARA TALUK. (DIED)

ADDITIONAL RESPONDENTS:

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2. KUNHI AYSSA, WIFE OF KUNHAVULLA,
KIZHAKKEPUTHENPURAYIL,
VYKKILASSERY AMSOM, KURIKKALANGAD DESOM,
P.O.KURIKKILANGAD, KOZHIKODE.

3. ABDU RAHIMAN, SON OF KUNHAVULLA, -DO-.

4. ISMAIL, SON OF KUNHAVULLA, -DO-.

5. RASHEED, SON OF KUNHAVULLA, -DO-.

6. RAFEEQ, SON OF KUNHAVULLA, -DO-.

7. SHAREEFA, DAUGHTER OF KUNHAVULLA, -DO-.

(ADDITIONAL RESPONDENTS 2 TO 7 ARE IMPLEADED AS LEGAL REPRESENTATIVES OF DECEASED RESPODNENT AS PER ORDER DT.18-9-2000 ON C.M.P.NO.1509/2000).

BY ADV. SRI.N.L.KRISHNAMOORTHY
SRI.K.LAKSHMINARAYANAN,D.ANILKUMAR
SRI.SATHYA SHRIPRIYA

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/12/2006, THE COURT ON

11/01/2007 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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S.A.No. 407 OF 1993-F

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Dated this the 11th day of January, 2007.

JUDGMENT

This second appeal arises from a suit for recovery of possession on the strength of title.

2. The suit property belonged to Ummatha, a mohamedan female. The defendant is her direct brother and the plaintiff is her half brother. She has certain other direct siblings also, going by the evidence in this case.

3. By Ext.A2 dated 15-12-1973, Ummatha made a gift in favour of the plaintiff, of the suit property, which includes a building, and formed a portion of a larger extent of her property, lying as one parcel. Thereafter, on 23-12-1975, by Ext.A3, she sold yet another part of her holding to the defendant and his wife.

4. Following her demise unmarried, issueless and

intestate, in 1988, the suit was filed, initially for injunction on the cause of action of an alleged attempt to trespass. Later, it was amended to be one for recovery of possession on the strength of title.

5. Contesting the suit, the defendant contended that Ext.A2 was never executed by Ummatha, that Ext.A2 is a result of forgery, that Ummatha was a mentally challenged person and that Ext.A2, if at all executed, is a sham document and was never acted upon and it had not taken effect. He also pleaded that he had been staying in the house in the suit property and that Ummatha was residing with him.

6. The trial court heard the evidence of P.W.2, the scribe of Ext.A2, P.W.1, the wife and power of attorney holder of the plaintiff and D.W.1, the defendant. It had also before it, apart from Ext.A1 power of attorney, Ext.A2, the gift deed in favour of the plaintiff and Ext.A3 sale deed in favour of the defendant and his wife, Exts.A4 and A5 tax receipts and Ext.A6 demand notice issued by the Chorode Panchayat

evidencing remittance and demand of property tax. Ext.A7 is an electoral roll pressed into service to disprove the claim of the defendant that he was staying in the building in the suit property. Exts.B1 to B3 are building tax receipts and extracts of assessment register showing remittance of tax and continued assessments in the name of Ummatha as regards the building in the suit property, in spite of Ext.A2 gift.

7. The trial court concluded that Ext.A2 gift deed was executed by Ummatha and that it is not a vitiated document. It also held against the case of the defendant that he had been residing in the suit property. It was held that he resided in a different building. However, it was held that the materials on record did not prove that the plaintiff had accepted Ext.A2 gift and accordingly, the suit was dismissed. The lower appellate court has confirmed this decree.

8. Hence, this appeal by the plaintiff, in support of which, Sri.O.Ramachandran Nambiar, learned counsel appearing for the appellant urged that the

finding that the plaintiff had not accepted Ext.A2 gift is perverse and the courts below have egregiously erred in law in the matter of appreciating the evidence on record resulting in the non-suiting of the plaintiff, leading to miscarriage of justice, and that, therefore, a substantial question of law arises on that point, for decision in this second appeal and that the plaintiff is entitled to a decree as prayed for.

9. Per contra, Sri.N.L.Krishnamoorthy, the learned counsel for the respondent contended that the findings arrived at are findings of facts and the appreciation of evidence cannot be treated as unreasonable or perverse warranting interference under Section 100 of the Code of Civil Procedure.

10. Having regard to the grounds raised in the memorandum of second appeal and the arguments advanced, the following substantial question of law is formulated for consideration in this appeal:

(i) In the backdrop of the fact that Ext.A2 has been upheld and that it

> contains a recital that the donor has transferred possession to the donee, have the courts below acted in accordance with law in appreciating the evidence on record in holding that the gift made as per Ext.A2 has not been accepted by the plaintiff?

11. Ext.A2 is a registered document. As already noticed, the courts below concurrently held that Ext.A2 was duly executed by Ummatha, the donor. It has all the essential ingredients of a gift, including a recital that the donor has put the donee in possession of the property covered by that gift. The relevant portion reads as follows:

The donor was to continue to take usufructs during her lifetime.

12. The courts below, particularly, the lower appellate court, rightly held that by reason of the

recital in the gift deed that the donor has delivered possession to the donee and since the original gift deed was produced from the custody of the plaintiff, a presumption arose that the gift has been accepted.

13. The evidence of the defendant as D.W.1 regarding his alleged continued occupation and residence of the building in the suit property along with his sister Ummatha and regarding the different other aspects that arose for consideration were disbelieved. It was also found that his case that he was staying along with Ummatha was not only wrong but he was proved to have been residing in another property and Ummatha was residing alone in the suit property. On the one hand, D.W.1 impeached Ext.A2 gift deed on the ground that his sister was mentally ill. At the same time, he had obtained from her Ext.A3 sale deed after Ext.A2. Such being the quality of evidence of D.W.1, the lower appellate court did not rely on the evidence of D.W.1 to aid the rebuttal of the presumption as to acceptance of Ext.A2 gift deed by the plaintiff.

14. However, in affirming the views of the trial court, the lower appellate court proceeded to hold that the presumption that the gift was accepted stands rebutted.

15. Now, I shall deal with the materials which led the lower appellate court to hold that the presumption as to acceptance stood rebutted. Going by the evidence of P.W.1, the plaintiff was not in station on the date of execution of Ext.A2. P.W.1's version that she was staying along with Ummatha was found against. She was found to be residing 3 kms. away from the suit property. She could not specifically state as to when and how the gift deed came to be in the possession of the plaintiff. Though Ext.A2 recites that an application for effecting mutation is also handed over along with the gift deed, that is not shown to have been carried out. It was on such basis that the lower appellate court held that the presumption as to acceptance of Ext.A2 stood rebutted.

16. P.W.2, the scribe gave evidence that plaintiff was not in station at the time of execution of Ext.A2. He added that the expenditure for the execution of the document was met by the plaintiff. The document, a registered one, contains the recital that possession of the property is being given by the donor to the donee. The original gift deed was produced by the plaintiff from his custody. There is not even a suggestion in defence that it was appropriated from Ummatha's custody or after her death, from her residence. On the teeth of the assertion of the defendant that the plaintiff had never stayed with Ummatha and that the defendant was staying with her, which case was disbelieved by the courts below, Ext.A4 receipt of payment of property tax for the year 1983, that was five years before the death of Ummatha, was produced by the plaintiff, from his custody. He also produced from his custody, Ext.A5 tax receipt dated 27-2-1986, two years before the death of Ummatha,. The demand notice for payment of tax issued in 1988, immediately before the death of Ummatha was also produced by the plaintiff, from his custody. D.W.1's version regarding all the material facts

touching his defence having been concurrently disbelieved, there was not an iota of material on the defence side to rebut the presumption drawn by the courts below, rightly, in favour of the plaintiff, that the gift was accepted. This is so found, also by the lower appellate court which exclusively relied on the evidence of P.W.1 to hold that the presumption as to acceptance of Ext.A2 gift deed, by the plaintiff, stood rebutted. In the words of the lower appellate court, "though there is no evidence coming from the defendant himself regarding the non-acceptance of the gift deed by the plaintiff, unfortunately, P.W.1, who is examined on behalf of the plaintiff, who is his wife, and who is the Power of Attorney Holder of the plaintiff, herself betrays the case of the plaintiff."

17. The appreciation of evidence in civil cases has to be on the preponderance of probabilities. The doctrine of proof beyond doubt does not apply. What is meant by preponderance of probabilities? How are the probabilities to be weighed? These depend on facts and circumstances of each case. But, in doing so, there

are certain cardinal principles of law that have to be followed. While a presumption could be rebutted even by a presumption, that which has to displace the former has to be sufficient enough to do so. Similarly, when evidence in rebuttal of a presumption is to be looked for in a civil case, that evidence must be of such value which cannot but lead to conclusion that the probability of the case arrived at on the basis of the presumption cannot continue to hold on the face of the evidence that would stand up in rebuttal of the presumption raised. In a civil case, inference of facts in issue has to be drawn on preponderance of probabilities, on a balance of evidence on the record. In appreciating the evidence, the courts have to apply the test of human probabilities and the appreciation of evidence must be from an ordinary reasonable human point of view. The evidence is to be weighed and the case cannot be decided on conjectures and surmises. The plaintiff is not required to prove his case beyond all reasonable doubt. What the courts have to see is whether the evidence, when read as a whole, appears to have a ring of truth and once such impression is

gained, they must scrutinise the evidence keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence and evaluate them to find out whether it is against the general tenor of the evidence.

18. The only material which the lower appellate court found, which according to it, rebuts the presumption as to acceptance of Ext.A2 gift by the plaintiff is a contradiction in the evidence of P.W.1, the wife and power of attorney holder of the plaintiff. The lower appellate court noticed that P.W.1, being a semi-literate mohamedan woman, is entitled to some allowance, while considering her evidence. She spoke that the plaintiff obtained possession of the property upon the execution of Ext.A2. In fact, this finds corroboration in Ext.A2 which is a registered gift deed, which contains the statement of the donor herself that she is parting with possession of the property to the donee. However, according to the lower appellate court, this evidence of P.W.1 cannot be true because the plaintiff was not in station on the date of

execution of Ext.A2 and therefore, he could not have taken possession, directly from the donor. Thus, finding a contradiction in the evidence of P.W.1, the lower appellate court notices the evidence of P.W.2 that it was P.W.1, the wife of the plaintiff who took possession on behalf of the plaintiff. The lower appellate court proceeds to state that P.W.1 does not have such a case and therefore, there is contradiction between the evidence of P.W.1 and P.W.2. P.W.1 stated that she knew nothing about the gift deed and that only her husband can speak about it. According to the lower appellate court, P.W.1 does not have a case that she accepted the gift and took possession of the property on behalf of the plaintiff and because the plaintiff was not in station on the date of Ext.A2, he had also not taken possession.

19. The courts below have materially misdirected themselves in the appreciation of evidence in the case. They had rightly arrived at the proposition that the plaintiff has to be given the benefit of a presumption that Ext.A2 had taken effect and that the plaintiff had

accepted that gift. Acceptance of gift of immovable property need not always be by taking over actual physical possession, in the sense, by the exercise of some overt act on, or, in relation to that property. This is all the more so in cases where the relationship between the donor and the donee has a fiducial content or where the donor, as in this case, keeps with himself or herself the privilege to collect the usufructs. The overwhelming evidence in this case is that the plaintiff produced from his possession not only the original gift deed, but two receipts for payment of property tax and a demand notice of property tax (Exts.A4, A5 and A6), all issued during the lifetime of the donor, Ummatha, and it is not the case of the defendant that the plaintiff stole out those documents from the donor's (Ummatha's) residence, though Exts.A4 to A6 stood in the name of Ummatha since mutation was not effected in favour of the plaintiff, following Ext.A2.

20. There is yet another factor which has not been considered in the proper perspective. The defendant

purchased an item of property from Ummatha under Ext.A3. According to the courts below, that is an item which is part of the larger holding, of which the suit property is a part, and therefore, had Ext.A2 been acted upon as a subsisting document, there was no reason for not referring to Ext.A2 in Ext.A3. This, in my view, is a wholly illogical, unreasonable and unavailable inference. I say so because, what is stated in Ext.A3 as one of the boundaries is the remaining part of the entire property. This does not mean that the donor Ummatha did not stand by Ext.A2 gift. Not only that, the courts below have categorically found that Ext.A2 is a gift deed that was accepted and all that remained was, if at all, for the plaintiff to accept. The plea of the defendant that Ext.A2 is a sham document was turned down. Therefore, after having held a presumption as having arisen in favour of the plaintiff as to the due acceptance of Ext.A2 gift, it was unavailable for the courts below to have considered that Ext.A2 was not acted upon by Ummatha while Ext.A3 sale deed was made in favour of the defendant and his wife, even though that document was also drafted by

P.W.2 document writer.

21. The thrust of the entire evidence on record is that Ummatha, a mohamedan female gifted the property covered by Ext.A2 to her half brother, the plaintiff. Among them, there was a clear understanding that the gift had taken place. This is because, the unchallenged testimony of P.W.2 is that the plaintiff provided the funds for the drafting, execution and registration of Ext.A2. The production of Ext.A2 as well as Exts.A4 to A6 (all originals) from the custody of the plaintiff is not impeached as one from unlawful origin or unlawful custody. So much so, the mere absence of the plaintiff in station on the date of execution of Ext.A2 and the inability of his wife as a power of attorney holder to give a definite version as to when plaintiff came into possession of Ext.A2 are not materials sufficient at all, in the eye of law, to rebut the presumption that the courts below concurrently drew, to the effect that Ext.A2 had taken effect and the plaintiff had accepted the gift. The finding to the contrary is unavailable on the materials on record and the resultant decisions

of the courts below are therefore vitiated by perverse appreciation of evidence. The same results in manifest miscarriage of justice, particularly when dealing with the gift of a dead person made more than 14 years before her death. Under such circumstances, the decisions of the courts below are liable to be reversed and the suit decreed.

In the result, this appeal is allowed setting aside the impugned decree and judgments and a decree is passed

(1) allowing the plaintiff to recover the plaint schedule property from the defendant and all persons claiming under him,

(2) prohibiting the defendant from trespassing into the plaint schedule property after recovery of the possession as aforesaid, and

(3) allowing the plaintiff to recover

from the defendant and his assets, costs through out.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

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THOTTATHIL B. RADHAKRISHNAN, J.

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JUDGMENT

Dated: 11th January, 2007.